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No. 93-377

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

(Additional Action Listed Inside Front Cover)

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENTS

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JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

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QUESTION PRESENTED

Does the Supreme Court decision in *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), holding that Congress by enacting the Indian trader statutes occupied the field of regulating trade with Indians, preclude states from imposing tax and regulatory burdens upon sales at wholesale of cigarettes to Indians on Indian reservations?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

Respondent Milhelm Attea & Bros., Inc. respectfully states that it has no corporate parents, subsidiaries or affiliates. The "also known as" designations in the caption of this case are listed as a result of typographical errors contained in documents issued by, or submitted to, one or more of the petitioners.

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No. 93-377

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

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Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENTS

STATUTORY AND REGULATORY PROVISIONS INVOLVED

25 U.S.C. §§261-264; New York Tax Law §§471, 474, 481, 1814, 1846, New York Tax Law §1847; and 20 NYCRR §335.6 and 20 NYCRR §335.7 are set forth as Appendix I to the petition for certiorari and as an Appendix to the petitioners' brief. In addition, 25 C.F.R. Part 140 (1993); New York Tax Law §472, subd. 1; and 20 NYCRR §331 and §332 are involved. Relevant portions of those statutory and regulatory provisions are set out in the appendix to this brief.

STATEMENT OF THE CASE

A. Introduction

The narrow issue presented in this case is whether the Court should continue to follow the well-settled rule established in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965) that the federal Indian trader statutes, 25 U.S.C. §§261-264, pre-empt all state taxation and regulation of sales of goods to Indians on Indian reservations. While this Court has permitted some state taxing authority on sales by Indians to *non-Indians* on the reservation, it has never permitted states to tax or regulate sales of goods *to Indians* on reservations because Congress has pre-empted that field.

The respondents sell cigarettes at wholesale to Indians on reservations. They challenged regulations enacted by New York tax administrators which, *inter alia*, restrict the wholesale sale of cigarettes by Indian traders to Indians on reservations and impose state cigarette taxes on all such sales except as to certain limited quantities of cigarettes approved by the State. Following *Warren Trading Post*, the New York Court of Appeals unanimously struck down the regulations, holding that they were pre-empted by the Indian trader statutes. The Court of Appeals rejected the petitioners' contention that decisions of this Court permitting states to require Indian retailers to collect taxes from non-Indian retail customers may be read as authority for regulating reservation sales to Indians.

B. Respondents

Respondents Milhelm Attea & Bros., Inc. ("Milhelm") and Elias H. Attea, Jr. ("Elias") (collectively the "Atteas") hold licenses from the United States Department of the Interior, Bureau of Indian Affairs ("BIA"), authorizing them to sell cigarettes on various Indian Reservations within the State of New York (R 339-43).[1] The BIA issued the licenses under the federal Indian trader laws. 25 U.S.C. §§261-264. Under the authority of their licenses, the Atteas sell cigarettes at wholesale to Indians on Indian reservations located in New York State. All of the Atteas' sales on the reservation are to Indians. They make no retail sales. *Milhelm Attea & Bros. v. Department of Taxation and Finance of the State of New York*, 81 N.Y.2d 417, 423, 599 N.Y.S.2d 510, 615 N.E.2d 994 (1993) (A6).

Milhelm also makes some of its total sales off the reservations, and is therefore licensed as a cigarette tax agent and a wholesale dealer under New York Tax Law. *Milhelm Attea & Bros. v. Department of Taxation and Finance of the State of New York*, 164 A.D.2d 300, 301 (3d Dept. 1990) (A21). Milhelm's off-reservation sales are not at issue in this case. Elias makes no off-reservation sales and is not licensed as either a cigarette agent or a wholesale dealer under New York law (A30).

C. The Tax Law

Under New York Tax Law §471[1], a tax is imposed on all cigarettes "possessed in the state by any person for sale" except that no tax is imposed "on cigarettes sold under such circumstances that [the] state is without

---

[1] References to the Appendix to the Petition for Certiorari are cited as "A____"; references to the Joint Appendix are cited as "JA____"; references to the statutory appendix to this Brief are cited as "RA____"; references to the Record are cited as "R____".

power to impose such tax" (A45). The tax is "intended to be imposed upon only one sale of the same package of cigarettes." New York Tax Law §471[1] (A46).

The tax is paid through purchases of stamps by agents registered by the petitioner New York Department of Taxation and Finance ("Department" or "State"), which stamps must be affixed to cigarette packages to be sold within the state. New York Tax Law §471[2] (A46). The tax must be advanced and paid by the agent, who is liable for the collection and payment of the tax imposed under Section 471 on cigarettes possessed in the state for sale (*Id.*). The taxes advanced and paid by the agent must be added to and collected "as part of the sales price of the cigarettes." New York Tax Law §§471[2] and [3] (A46).

The law prescribes both civil and criminal penalties for failure to pay the tax, and also provides for the seizure and forfeiture of unstamped cigarettes. New York Tax Law §§481, 1814, 1846 (A50-A62).

Prior to August 1988, the Department, which administers the cigarette tax, made no attempt to collect the tax on cigarettes sold on Indian reservations to Indians by wholesalers, including sales by the Atteas, although the Department knew of such sales. Milhelm, as a cigarette tax agent, has filed monthly tax returns with the Department since 1984 reporting the quantities of unstamped cigarettes it sold on Indian reservations (R 58).

D. The Regulations at Issue

On August 29, 1988 the Department adopted the cigarette tax regulations at issue in this case (A62-A74; JA 27a-41a). The regulations, which became effective

January 1, 1989, place numerous limitations on sales by wholesalers such as the Atteas to Indians on Indian reservations.

1. **The regulations impose state cigarette taxes on all sales to Indians on reservations except as to limited quantities of cigarettes determined by the State.** Under the regulations, untaxed cigarettes may only be sold and delivered on a reservation to an "exempt Indian nation or tribe, a qualified Indian consumer, or a registered dealer; provided that [the seller] complies with the applicable provisions of [the regulations] with respect to approval of the amount of such cigarettes to be sold and delivered, and further complies with all of the requirements of this Subchapter." 20 NYCRR §335.7(b)(3) (A71). The regulations further provide that Indian tribes, Indian consumers or Indian dealers who purchase cigarettes "under any other circumstances must prepay or pay, as the case may be, the cigarette tax at the time of purchase by remitting the tax to the seller as part of the purchase price of the cigarettes." 20 NYCRR §335.7(e) (A74). The Department issued Notice N-88-53 to wholesalers concerning a coupon system used to administer reservation sales of cigarettes, stating:

> If the sale exceeds the preprinted amount or if you do not obtain a coupon for a sale made to a registered dealer, you *must collect all* applicable taxes from the dealer for any portion exceeding the preprinted amount of the coupon. If you fail to do so you will be held liable for the tax due.

(JA 44a-45a) (emphasis original).

2. **The regulations limit who may sell at wholesale on the reservations.** Only cigarette agents licensed by the State may sell to Indian tribes or to "registered dealers" on the reservations (JA 44a) 20 NYCRR §§335.7(b)(2), (3)

(A71).[2] This provision, in turn, subjects wholesalers selling to Indians on reservations to the entire state scheme regulating cigarette agents including license fees totalling $3,000.[3]

3. The regulations limit the number of untaxed cigarettes which may be sold on the reservations by setting absolute limits on the quantities which may be sold. The quantities approved by the Department are based upon "evidence of valid purchase orders received by the agent of quantities of cigarettes reasonably related to the probable demand of qualified Indian consumers in the trade territory of the exempt Indian nation . . . or registered dealer." 20 NYCRR §335.7(d) (A72-A74). The Department calculates "the probable

[2] The notice sent by the Department to the Atteas and other wholesalers stated "only . . . licensed cigarette agents may sell tax-free products either to an Indian nation or to a registered dealer . . ." (JA 44a). The regulations themselves provide that "registered dealers" may also sell to other "registered dealers," 20 NYCRR §335.6(f)(2) (A67), but only cigarette agents may import cigarettes onto the reservations, 20 NYCRR 335.7(b)(2) (A71), and only retailers (Indian or non-Indian) and Indian wholesalers (but not non-Indian wholesalers) may qualify as "registered dealers." 20 NYCRR §335.6(b)(4) (A63).

[3] The fee for a cigarette agent's license is $1,500. New York Tax Law §472(1) (RA1). Cigarette agents who are also wholesalers must also obtain a license as a wholesale dealer, 20 NYCRR §331.1(e)(2) (RA7), which also requires an application fee of $1,500. 20 NYCRR §332.1(b)(1) (RA9). Cigarette agents and wholesalers may be required to renew their licenses (and pay a new fee) every three years. 20 NYCRR §§331.1(b)(4)(c)(2) (RA 6-7). The cigarette agent must post a performance bond in the amount of $1,000, or other acceptable security. 20 NYCRR §§331.2(b), 331.3(a) (RA7, RA8). The agent must have commitments from at least two manufacturers whose aggregate share of the New York State cigarette market is at least 40 percent as to the quantity of cigarettes they will sell him, and "must maintain a separate warehousing facility for the purpose of receiving and distributing cigarettes and conducting its business." 20 NYCRR §331.1(a)(2)(i) (RA5-RA6).

demand of qualified Indian consumers" based on the New York average consumption of cigarettes per capita, multiplied by the number of enrolled tribal members (or, if unavailable, the reservation service area population as compiled by the BIA). 20 NYCRR §335.7(d)(2)(ii) (A73). There is an alternative procedure to determine demand based on consultation with a tribe which regulates cigarette sales on its reservation, 20 NYCRR §335.7(d)(2)(i) (A72-A73), but this provision has not been used (R 244).

4. The regulations provide for State determination of the cigarette demand for the trade territory of each tribe and each registered dealer. 20 NYCRR §335.7(d) (A72-A74). The Department determines each trade territory "based upon the information at its disposal," unless a tribe regulates cigarette sales on its reservation, in which case the Department will "consult" with the tribe regarding trade territories on its reservation before it makes its determination. 20 NYCRR §335.7(d)(3) (A73). In calculating demand within a registered dealer's trade area, the Department will consider evidence submitted by a registered dealer. 20 NYCRR §335.7(d)(4) (A73-A74).

5. The regulations require prior approval by the Department of each wholesale sale. The cigarette agent "must obtain approval for delivery from the Department regarding the amount of cigarettes to be sold and delivered without prepayment and precollection of the tax, prior to each such sale and delivery of any such cigarettes on such reservation." 20 NYCRR §335.7(c)(2) (A72). There is an alternative provision for similar preapproval by the relevant tribe instead of the Department, but only if the tribe agrees with the Department to limit the sale of untaxed cigarettes on its reservation to "an agreed upon amount," which no tribe

has done. 20 NYCRR §335.7(c)(1) (A72). If the agent sells cigarettes in excess of the approved amount, he is liable for the tax on the excess amount. 20 NYCRR §335.7(e) (A74; JA 45a).

6. **The regulations limit who may purchase untaxed cigarettes at wholesale.** Such sales may only be made to "registered dealers" and certain tribes. A "registered dealer" is either a retail dealer or an Indian wholesaler (more precisely, a wholesaler who is a member of a New York tribe) who is registered with the Department. 20 NYCRR §335.6(b)(4) (A63-A64). A tribe must obtain an "exempt organization certificate" from the Department in order to purchase untaxed cigarettes. 20 NYCRR §335.6(d)(1) (A65). The registered dealer or tribe may lose its authority to purchase untaxed cigarettes if it does not comply with all requirements imposed by the Department. 20 NYCRR §335.6(d)(3) and (f)(5) (A66).

7. **Tax Exemption Coupons issued by the State must accompany each sale.** The Department's Notice N-88-53 stated:

> Each month registered dealers will receive "Tax Exemption Coupons" for "Registered Dealers" from the Tax Department entitling them to make purchases of motor fuel, diesel motor fuel and/or cigarettes on which the applicable prepaid excise and sales taxes have not been passed through.
>
> To purchase tax-free product from you, the registered dealer must complete the tax exemption coupon, submit the Department copy (white) and the Distributor/Agent copy (pink) to you and keep the Dealer copy (yellow). The registered dealers must submit the tax exemption coupon to you before or at the time of delivery of the product.
>
> You must keep the Distributor/Agent copy (pink) for your records and submit the Department copy (white) within 5 days of delivery of the tax-free product to the Audit Division/FACCTS—Indian Matters at the address on page 4.
>
> You may sell tax-free product *only* to the registered dealer named on the coupon and deliver the product *only* to the locations specified on the coupon. In addition, the amount of tax-free product sold may *not* exceed the preprinted amount authorized by the coupon. If the sale exceeds the preprinted amount or if you do not obtain a coupon for a sale made to a registered dealer, you *must collect all* applicable taxes from the dealer for any portion exceeding the preprinted amount of the coupon. If you fail to do so, you will be held liable for the tax due.

(JA 44a-45a) (emphasis in original).

8. **The regulations impose additional administrative requirements on wholesalers.** Wholesalers must segregate taxed and untaxed product, must distinguish between taxed and untaxed cigarettes on every bill, invoice, receipt or other sales record, must retain exemption certificates from the purchasers, and must report all sales of untaxed product to the Department (JA 45a), 20 NYCRR §335.6(g) (A68-A69).

9. **The regulations also impose additional limitations on subsequent retail sales of untaxed cigarettes.** Retailers can only sell to tribal members who produce tax exemption certificates from the Department. 20 NYCRR §335.6(e)(2) (A66). The retailer must keep detailed records of each exempt sale. 20 NYCRR §335.6(g) (A68-A69). Untaxed cigarettes may be purchased at retail only for the purchaser's own use and only on the reservation where purchased. 20 NYCRR §335.6(e)(1)(ii) (A66).

E. Proceedings Below

In December 1988, prior to the effective date of the regulations, Milhelm and Elias commenced separate actions in the New York State Supreme Court, Albany County, claiming that the regulations, to the extent they impose additional state burdens on the Atteas' wholesale sales of cigarettes to Indians on Indian reservations, were pre-empted by the Indian trader statutes, 25 U.S.C. §§261-264, and the Indian Commerce Clause, United States Constitution, Art. 1, Sec. 8, cl.3 (JA 11a-41a, 51a-65a). The Atteas named as defendants the petitioners herein. They sought judgment declaring the regulations unconstitutional and injunctions restraining the State from enforcing the regulations or otherwise regulating or imposing state taxes in connection with their wholesale sales of cigarettes to Indians on Indian reservations (JA 19a-24a; 59a-64a).

In a joint order and judgment entered on August 22, 1989, the trial court granted summary judgment permanently enjoining application of the Department's cigarette tax scheme to the Atteas' wholesale sales to Indians on Indian reservations (A33-A43).

In its initial decision in this case, the Appellate Division, Third Judicial Department, unanimously affirmed the trial court. 164 A.D.2d 300, 564 N.Y.S.2d 491 (3d Dept. 1990) (A19-A24).

The New York Court of Appeals dismissed, *sua sponte*, the State's attempt to appeal as of right from the Appellate Division's affirmance, 77 N.Y.2d 989, 571 N.Y.S.2d 994, 575 N.E.2d 400 (1991), and denied the State's subsequent motion for leave to appeal to the Court of Appeals. 78 N.Y.2d 858, 575 N.Y.S.2d 454, 580 N.E.2d 1057 (1991).

On January 21, 1992, this Court granted the State's initial certiorari petition, and entered a summary reconsideration order vacating and remanding the case to the Appellate Division "for further consideration in light of *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991)." 112 S.Ct. 926 (1992) (A17-A18).

On remand, the Appellate Division reversed itself and upheld the regulations. 181 A.D.2d 210 (3d Dept. 1992) (A13). Although the court noted that the federal pre-emption issue presented by the instant case was not before the Supreme Court in *Potawatomi* (A13-A16), it determined from this Court's *dictum* in *Potawatomi* concerning state collection of taxes from wholesalers that "the Supreme Court is of the view that not all burdens placed upon Indian traders" are impermissible (A15).

On June 10, 1993, the New York Court of Appeals unanimously reversed the Appellate Division and struck down the regulations, holding that they were pre-empted by the federal Indian trader statutes. 81 N.Y.2d 417, 599 N.Y.S.2d 510, 615 N.E.2d 944 (1993) (A3). The court reasoned that the Indian trader statutes pre-empted the field of regulation of traders, and that the regulations imposed significant burdens on the wholesalers' trade with Indian retailers.

The Court of Appeals quoted from *Warren Trading Post*, where this Court held " '[t]hese apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so firmly in hand that no room remains for state laws imposing additional burdens upon traders.' " 81 N.Y.2d at 424 (A7) (quoting 380 U.S. at 690).

The Court of Appeals rejected the State's argument that "minimal burdens" could be placed on Indian traders to collect a tax ultimately borne by non-Indian consumers. *Id.* at 424-425 (A7-A8). The court reasoned that there was a "significant difference" between placing minimal burdens on Indian retailers selling to non-Indians, as allowed by this Court in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), and placing such burdens on reservation sales by wholesalers to Indians. 81 N.Y.2d at 425 (A8).

The Court of Appeals held that the respondents' wholesale sales of cigarettes were squarely covered by the Indian trader laws and regulations and, thus, state taxation and regulation of such sales were pre-empted under *Warren Trading Post*. Subsequent sales of cigarettes by Indian retailers to non-Indians are not covered by the Indian trader statutes and regulations. " 'The Indian trader statutes, 25 U.S.C. §261 *et seq.* incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange. . ., *but no similar intent is evident with respect to sales by Indians to non-members of the Tribe*' " 81 N.Y.2d at 424-25 (quoting *Colville*, 447 U.S. at 155-56) (emphasis by the Court of Appeals). This distinction is critical and served as the cornerstone of the opinion of the Court of Appeals.

The Court of Appeals rejected the State's argument that this Court's decision in *Potawatomi*, 498 U.S. 505 (1991), allows "minimal burdens" to be placed on wholesalers. 81 N.Y.2d at 425 (A9). The court noted that *Potawatomi* involved the doctrine of tribal sovereign

immunity rather than pre-emption under the Indian trader statutes. *Id.* (A9). Addressing the *dictum* in *Potawatomi* that States may collect the sales tax from wholesalers by off-reservation seizures or by assessments, the court believed that the statement did not alter "the established rule stated in *Warren Trading Post Co. v. Arizona Tax Commission, supra*, (380 U.S. at 690) that Congress has taken the matter of regulating Indian traders so fully in hand that no room remains for state laws imposing additional burdens upon them." 81 N.Y.2d at 426 (A10). The Court of Appeals noted that *Potawatomi* did not address the relevant decisions in this area, and that court did not read *Potawatomi* "as altering the established law regarding federal pre-emption or validating comprehensive regulation by a state of the relationship between Indian traders and their Indian purchasers." *Id.* at 427 (A11).[4]

The Court of Appeals further held that even if this Court's decisions in *Moe*, *Colville*, and *Potawatomi* may be read as validating the imposition of minimal burdens on Indian retailers and Indian traders, the tax regulations were nonetheless barred by federal pre-emption because they imposed "significant" burdens on the wholesalers' trade with Indians by dictating the number of unstamped cigarettes the wholesalers may sell to reservation Indians, by directing with whom the wholesalers may trade and, to the extent the wholesalers had to prepay taxes on all cigarettes delivered on the

[4] The Court of Appeals also referred to its prior decision in *Herzog Bros. Trucking, Inc. v. State Tax Commission*, 69 N.Y.2d 536, 545-46, 516 N.Y.S.2d 179, 508 N.E.2d 914 (1987), *vacated and remanded*, 487 U.S. 1212, *adhered to on remand*, 72 N.Y.2d 720, 536 N.Y.S.2d 416, 533 N.E.2d 914 (1988), where it held that state taxation and regulation of motor fuel sales by an Indian trader to Indian retailers on reservations were pre-empted by the federal Indian trader laws, citing *Warren Trading Post*, 81 N.Y.2d at 423, 424 (A6, A7).

reservation in excess of the predetermined maximum amount approved by the Department, by imposing a tax on the sales to the Indian retailers. *Id.* (A11). The court found that the regulations therefore impinged on the federal interest of comprehensively regulating trade with the Indians, and on the authority of the Commissioner of Indian Affairs to determine " 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.' " *Id.* (A11-A12) (quoting 25 U.S.C. §261).

SUMMARY OF ARGUMENT

1. The Constitution grants Congress the "Power . . . to regulate Commerce with the Indian Tribes." Article 1, Section 8, Clause 3. By enacting the Indian trader statutes, 25 U.S.C. §§261-264 (A44-A45), Congress has comprehensively regulated trade with reservation Indians. Extensive regulations have been promulgated under such statutes. 25 C.F.R. Part 140 (RA11-RA23).

This Court held in *Warren Trading Post* that such comprehensive federal regulatory scheme totally pre-empted all state laws regulating sales to Indians on reservations. The Court held that such federal regulation was so comprehensive "that no room remains for state laws imposing additional burdens upon traders." 380 U.S. at 690. In *Central Machinery Company v. Arizona Tax Comm'n*, 448 U.S. 160 (1980), the Court reaffirmed that "Congress has pre-empted the field" with respect to regulating sales of goods to Indians on reservations. *Id.* at 165.

The State cigarette tax regulations clearly regulate transactions covered by the Indian trader laws and regulations. Rather than constituting mere "record keeping", the State's regulations affect quantities,

prices, sale locations, sales documentation, who can make sales and to whom they can sell, and impose a tax on the wholesale sale of cigarettes to Indians on reservations. In the case at bar, the New York Court of Appeals, following *Warren Trading Post*, properly held that the State's regulations were pre-empted by federal law. 81 N.Y.2d 417, 422, 425-27 (A4, A9-A10).

The Court's decisions in *Moe* and *Colville* involved collection by an Indian retailer of a valid tax imposed on a non-Indian retail customer. Tax and regulatory burdens upon a sale by an independent wholesaler to Indians on reservations were not at issue. Federal pre-emption was not implicated in such cases, since the Indian trader laws pertain only to sales to Indians, not sales to non-Indians. *Colville*, 447 U.S. at 155-56. *Central Machinery*, which reaffirmed *Warren Trading Post*, was decided after *Moe* and *Colville*. Hence, *Moe* and *Colville* do not constitute authority for altering the established rule set forth in *Warren Trading Post*.

The Court's decision in *Potawatomi* restated that *Moe* and *Colville* "stand for the proposition that the doctrine of tribal sovereign immunity does not prevent a state from requiring Indian retailers doing business on tribal reservations to collect a state-imposed cigarette tax on their sales to nonmembers of the Tribe." 498 U.S. at 513. The decision in *Potawatomi* was based on the doctrine of sovereign immunity, and federal pre-emption was not at issue. Therefore, the Court of Appeals properly held that the Court's decision in *Potawatomi* did not alter the established rule set forth in *Warren Trading Post*, that the Indian trader statutes pre-empt all state laws pertaining to sales to Indians on reservations. 81 N.Y.2d at 425-26 (A9-A11).

As stated in *Central Machinery*, "[u]ntil Congress repeals or amends the Indian trader statutes, however, we must give them 'a sweep as broad as [their] language . . .'." 448 U.S. at 166. Although Congress has had over 25 years to change the decision in *Warren Trading Post* if it disagreed with it, Congress has not chosen to do so. The State's arguments based on "policy" should be addressed to Congress, not this Court. In addition, the State has other alternatives to regulating where state action is pre-empted, including entering into tax collection agreements with Indian tribes, or developing a constitutionally permissible system for collecting taxes at the retail level, consistent with *Moe*, *Colville* and *Potawatomi*.

2. The Indian trader statutes grant the Commissioner of Indian Affairs "the sole power" to appoint Indian traders and to regulate all aspects of sales to Indians, including specifically quantity and price. 25 U.S.C. §261 (A44). The challenged regulations encroach on the Commissioner's authority by regulating quantity, price, who can make sales and to whom they can sell. Thus, the State's regulations also are pre-empted because they impinge upon matters expressly covered by federal law.

3. Because New York's Tax Law requires that the cigarette tax be added to and collected as part of the sale price of the cigarettes upon a sale by a wholesaler to an Indian retailer, enforcement of the regulations at issue as part of the State's collection process would violate the long standing principle that Indians are immune from state taxation. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-171 (1973). Indeed, the New York Court of Appeals found that the regulations impose "a sales tax on Indian retailers." 81 N.Y.2d at 427 (A11).

The decision of the New York Court of Appeals should be affirmed.

ARGUMENT

POINT I

THE STATE CANNOT TAX OR REGULATE INDIAN TRADERS' SALES OF CIGARETTES TO INDIANS BECAUSE CONGRESS HAS PRE-EMPTED THE FIELD OF REGULATING SALES OF GOODS TO INDIANS ON RESERVATIONS.

A. This Court has held that the Indian Trader Statutes Pre-empt State Laws Imposing Additional Burdens on Traders.

1. *The Indian Trader Statutes.*

Since enactment of the original Indian trader statutes in 1790, Act of July 22, 1790, Ch. 33, 1 Stat. 137, Congress has comprehensively regulated trade with Indians and the licensing of those who sell goods to Indians on reservations. The original Indian trader statutes, as well as all succeeding laws, were enacted under the Indian Commerce Clause of the Constitution, Art. I, Section 8, cl. 3, which granted Congress the "Power . . . to regulate Commerce with the Indian Tribes." Under the Indian Commerce Clause, "Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985).[5]

Existing law provides:

> The Commissioner of Indian Affairs shall have the *sole* power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper

[5] This Court noted in *Oneida* that the national government's lack of exclusive power over trade with the Indians was viewed as a key deficiency of the Articles of Confederation, and led to adoption of the Indian Commerce Clause. 470 U.S. at 234 n.4.

> specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

Act of Aug. 15, 1876, ch. 289, §5, 19 Stat. 200, 25 U.S.C. §261 (A44) (emphasis added).

A person wishing to trade with the Indians is "permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe," once he has established "to the satisfaction of the Commissioner . . . that he is a proper person to engage in such trade." Act of Mar. 3, 1901, Ch. 832, §1, 31 Stat. 1066, as amended by the Act. of Mar. 3, 1903, Ch. 994, §10, 32 Stat. 1009, 25 U.S.C. §262 (A44). Trade may be prohibited by the President, Act of June 30, 1834, Ch. 161, §3, 4 Stat. 729, 25 U.S.C. §263 (A44-A45), and there are penalties for trading without a license. Act of July 31, 1882, Ch. 360, 22 Stat. 179, 25 U.S.C. §264 (A45).

Pursuant to this statutory authority, the Commissioner of Indian Affairs[6] has promulgated comprehensive regulations governing the licensing and conduct of Indian traders. 25 CFR §§140.1-140.26 (1993) (RA11-RA23). An applicant for an Indian trader's license must submit detailed information regarding where it proposes to carry on trade, financing, business experience, and the persons the applicant intends to employ. Both the applicant and employees must provide detailed references. 25 CFR §140.9(a) (RA18-RA19). Tobacco sales to Indians under 18 years of age are prohibited. 25 CFR §140.16 (RA21). Gambling and drug

[6] All functions of the Commissioner of Indian Affairs have been transferred to the Secretary of the Interior. Reorg. Plan No. 3 of 1950, §§1, 2, 64 Stat. 1262, set out in 5 U.S.C.A. App. at 231 (1967). Because the relevant statutes and regulations continue to refer to the Commissioner, however, we refer to the Commissioner throughout this brief.

sales on licensed premises are prohibited. 25 CFR §§140.19, 140.21 (RA22). The trader's prices are reviewable by federal officials and must be fair and reasonable; the trader's books are subject to inspection; merchandise must be of good quality; and credit practices are restricted. 25 CFR §§140.22, 140.23, 140.24 (RA22-RA23). The President may prohibit the introduction of goods to any tribe altogether, if he finds the public interest so requires. 25 CFR §140.2 (RA12).

2. *Warren Trading Post and Central Machinery.*

In *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), the Court struck down the imposition of Arizona's gross proceeds tax on an Indian trader. The Court held that by enacting the Indian trader statutes, Congress has pre-empted the field of regulating trade with Indians on reservations. The Court observed that the statutes were "comprehensive" and the regulations promulgated thereunder were "apparently all-inclusive", and concluded that the Indian trader statutes and regulations "would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Id.* at 690.

The Court's unanimous opinion in *Warren Trading Post* traced the federal government's "sweeping and dominant control over persons who wished to trade with Indians and Indian tribes" from the "very first days of our Government," "by the first Congress," and "in the very first volume of the federal statutes."[7] *Id.* at 687-88. The Court found that "such comprehensive federal regulation of Indian traders has continued from that day

[7] Act of July 22, 1790, 1 Stat. 137.

to this" and described how the detailed regulations promulgated by the Commissioner of Indian Affairs prescribed "in the most minute fashion" the federal requirements imposed on Indian traders. *Id.* at 689.

After reviewing the federal interest in regulating trade with Indians, the Indians' freedom to run their affairs without state control, and the absence of any state responsibility in Indian matters, the Court in *Warren Trading Post* concluded:

> We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on [the trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.

380 U.S. at 691. Thus the Court held that Indian traders are "immune" from state taxes upon their sales to Indians. 380 U.S. at 691 n. 18. The Court in *Warren Trading Post* also noted that the Solicitor's Office of the Department of Interior had twice interpreted the federal Indian trader statutes to bar States from taxing federally licensed Indian traders on their sales to reservation Indians, and that those rulings were correct. 380 U.S. at 690 (citing 57 I.D. 124 (1940); 58 I.D. 562 (1943)).

The Court reaffirmed *Warren Trading Post* in *Central Machinery Company v. Arizona Tax Comm'n*, 448 U.S. 160 (1980). In that case, the Court held that federal regulation of Indian traders was so comprehensive that

States lacked authority to tax an on-reservation sale by an Indian trader to a tribe even though the trader was unlicensed and did not maintain a place of business on the reservation. "It is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." 448 U.S. at 165. The Court held that Congress had " 'undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject.' " 448 U.S. at 166, quoting *Warren Trading Post*, 380 U.S. 685, 691 n. 18.

The decisions in these cases make it clear that the key inquiry determinative of federal pre-emption in this area is whether the state is taxing or regulating a transaction which is governed by the Indian trader statutes. "[S]ince the transaction in the present case is governed by the Indian trader statutes, federal law pre-empts the asserted state tax." *Central Machinery*, 448 U.S. at 165. It is not significant whether the economic impact of the tax is borne only by the Indian, or only by the trader. The tax was barred in *Warren Trading Post* because it imposed a financial burden "on [the trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed." 380 U.S. at 691.[8]

The Indian trader statutes and regulations have broad application. First, the Indian trader statutes by their terms are not limited to retail or consumer transactions. Indeed, the reference in Section 262 to "any person desiring to trade", and the references in Sections 263 and 264 to the "introduction of goods" and "introduc[ing] goods" to a reservation or Indian country, clearly encompass the wholesale distribution of goods. In fact,

[8] *See also Central Machinery*, 448 U.S. at 164 n.3 (regardless of the label placed upon a tax, "its imposition as to on-reservation sales to Indians" is pre-empted).

Central Machinery concerned a *commercial* transaction with reservation Indians involving the on-reservation sale of 11 tractors to an Indian farming enterprise. 448 U.S. at 161. The Court there rejected a narrow interpretation of the scope of the Indian trader laws and regulations, reasoning that such a narrow construction could lead to circumvention of the federal policy to be protected. 448 U.S. at 165.

Second, the history of the Indian trader statutes reflects a broad and all-inclusive application to all aspects of trade with Indians. When those statutes were adopted, it was understood that under the Indian Commerce Clause and federal laws and treaties, "all intercourse with [the Indians] shall be carried on exclusively by the government of the union," or persons under its authority. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832), cited in *Warren Trading Post*, 380 U.S. at 688. In *Williams v. Lee*, 358 U.S. 217 (1959), the Court recognized that the Indian trader statutes were enacted in reliance on the proposition that states have no regulatory powers on reservations:

> Congress has also acted consistently upon the assumption that the states have no power to regulate the affairs of Indians on a reservation. To assure adequate government of the Indian tribes, it enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a department of Indian affairs.

358 U.S. at 220. Thus, reading the Indian trader laws "in light of the common notions of the day and the assumptions of those who drafted" them, *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1975), leads to the conclusion that Congress' purpose was to regulate fully this area, the precise conclusion reached by this Court in *Warren Trading Post*.

Because this Court has determined in *Warren Trading Post* that Congress occupied the field of regulating Indian traders' sales to Indians on reservations, the pre-emptive effect of the Indian trader laws and regulations is not limited to situations where state laws are in direct conflict with the federal regulatory scheme. *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1982) (absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found, *inter alia*, from a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."); *Fidelity Federal Savings & Loan Assoc. v. De la Cuesta*, 458 U.S. 141, 153 (1982). *Warren Trading Post* stated that "state laws imposing *additional* [not *conflicting*] burdens upon traders . . ." were not permitted. 380 U.S. at 690 (emphasis added). Of course, where Congress has pre-empted the field, the state cannot enter it—whether or not its action would actually conflict with a federal law. *See, e.g., Pacific Gas & Elec. Co.*, 461 U.S. at 213-14; *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 (1978); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

3. ***The Instant Case.***

The Atteas' wholesale sales to Indians on reservations are clearly governed by the Indian trader statutes and regulations. As parties introducing goods onto Indian reservations, the Atteas must comply with federal licensing requirements. 25 U.S.C. §264. They are subject to the regulatory authority of the Commissioner of Indian Affairs as persons "desiring to trade with the Indians on an Indian reservation." 25 U.S.C. §262. Similarly, their sales to Indians come within the Commissioner's "sole power and authority" to make

regulations "specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. §261. Indeed, the State has never contended that the Atteas' sales and deliveries to Indians on reservations are not within the scope of such federal regulation.

The state tax law and regulations at issue herein directly burden transactions governed by the federal regulatory scheme. They impose a state tax upon all wholesale sales by the Atteas to Indians on reservations except as to certain limited quantities of cigarettes determined by the State, and require that the Indian trader add that tax to the sales price of the cigarettes and collect the tax from the Indians as part of the price. New York Tax Law §471[1], [3] (A45-A47), 20 NYCRR §§335.6(f); 335.7(b)(3)(c) and (d) (A67, A71-A74). The regulations also comprehensively regulate such transactions by limiting the Atteas to selling untaxed cigarettes only to certain persons or entities, such as Indians who have registered with the State as "Registered Dealers." 20 NYCRR §§335.6(b)(4) and (f); 335.7(b)(1) (A62-A63, A66-A67, A71). The regulations control the location on the reservation where such sales may be made, the sales documentation to be used, the records to be kept by both the Indian trader and the Indians, and the quantities of unstamped cigarettes which may be sold to reservation Indians by the Indian trader. 20 NYCRR §335.7 (A70-A74).

These regulations impose a liability on both parties to the wholesale transaction, increase the trader's financial exposure when selling to Indians on open account, increase the capital requirements of Indian wholesale purchasers by increasing the cost of goods purchased, interfere with the trader's customer relationships, and

create additional record keeping expense, among other burdens. Thus, additional state requirements are imposed in areas specifically covered in minute detail by the federal Indian trader statutes and regulations.

The contention that the regulations constitute "off-reservation compliance", as *amici* argue, is simply inaccurate. By definition, the regulations pertain to sales *on* reservations (20 NYCRR §§335.7) (A70), and the judgment below is limited to the Atteas' sales to Indians on reservations (A34-A43).

The Court of Appeals correctly held that such state tax regulations were pre-empted because they regulate transactions in an area reserved exclusively to the federal government. Accordingly, the judgment below should be affirmed.

B. The decisions relied on by petitioners do not support the imposition of additional burdens on traders by the State.

To avoid the clear proscription of *Warren Trading Post* and *Central Machinery* against state regulation of sales to Indians, the State argues that the Court's decisions regarding regulation of reservation retail sales by Indians to non-Indian customers in *Moe v. Confederated Salish and Kootenai Tribe*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980), have been extended by *dictum* in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), to allow state taxation and regulation of sales at wholesale by Indian traders to Indians on reservations. The State's reliance on such cases is misplaced.

1. ***Moe and Colville distinguish between sales by traders to Indians, which are comprehensively regulated by the Indian trader laws, and sales to non-Indians, which are not so regulated, and allow minimal burdens only on sales to non-Indians.***

Moe and *Colville* are cases of limited application. They do not stand for the proposition that states may intrude upon all aspects of Indian trade in order to "prevent avoidance of tax by non-Indian purchasers of goods from Indian retailers." (Pet. Br. at 14). Those cases also did not involve "the viability of state tax schemes which employ an Indians' [*sic*] supplier as an aid to enforcement." (Pet. Br. at 17).

At issue in *Moe* and *Colville* was the imposition of state regulatory burdens at the retail level upon retailers who were selling to non-Indians. The Court approved state requirements that retailers *collect* taxes from non-Indian retail customers, because the tax was imposed on the non-Indian retail customer, and mere collection of the tax from the non-Indian retail customer did not offend considerations of tribal sovereignty or violate any federal law. *Moe*, 425 U.S. at 483; *Colville*, 447 U.S. at 155-57. The Indian trader statutes were inapplicable to such retail sales to non-Indians.

In *Moe*, the tribal retailers argued that under *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 175 (1973), the State could not impose its cigarette tax on retail sales to non-Indians nor require the tribe to assist the state by collecting such taxes at the time of the retail sale to the non-Indian customer. 425 U.S. at 481-82. The tribe contended that such requirements constituted "gross interference with [its] freedom from state regulation." *Id.* at 482. The Court held that,

to the extent that the Indian retailers sell to non-Indian retail customers on whom the state has imposed a valid tax, "the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid in the State's collection and enforcement thereof." *Id.* at 483. The Court distinguished *Warren Trading Post* as a decision concerning burdens imposed upon "Indian traders for trading with Indians on reservations," *id.* at 482, and thus inapplicable to a sale to a non-Indian. The Court also held that the requirement that the Indian retailer add the tax to the sales price and collect it did not violate *McClanahan* or *Mescalero* because it was "not, strictly speaking, a tax at all" upon the Indian. 425 U.S. at 483.

In *Colville*, the Court held that Indian retailers could be required to assist the State in collecting taxes from non-Indian retail customers by purchasing from the State a quantity of tax stamps and affixing such stamps to individual packages of cigarettes at the time of retail sale of such cigarettes to non-members of the tribe. 447 U.S. at 159. The Court rejected the contention that the burden of collection imposed on the retail transaction with a non-Indian was pre-empted by federal law, holding expressly that there was a distinction between a sale to an Indian and a sale to a non-Indian:

> The Indian trader statutes, 25 U.S.C. §261 *et seq.*, incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange, *see, Warren Trading Post Co.* . . ., but no similar intent is evident with respect to sales by Indians to non-members of the Tribe.

447 U.S. at 155-56.

In *Moe* and *Colville*, the state requirements were completely independent of the wholesale transactions between the Indian vendor and his supplier. Critical to each decision was the fact that the specific transactions at issue were sales to non-Indians, and thus the Indian trader statutes were not implicated. Therefore, neither case is authority for state regulation of sales like those at issue in this case—namely, sales at wholesale by Indian traders to Indians.

Neither *Moe* nor *Colville* approved a requirement that Indian vendors prepay state taxes to their wholesale suppliers. Contrary to the State's assertion (Pet. Br. at 15), neither the Court nor the district court passed on or endorsed the application of the pre-payment provisions of the Montana tax statute in *Moe*. 425 U.S. at 468, n.6. The Court's holding expressly stopped short of such a requirement. *Id.* The only "collection requirement" of the Montana law approved by the Court was at the retail level, on sales to non-Indians.

In *Colville*, the Court explained that regulation was limited to retail sales to non-Indians in part because under the Constitution and Washington's tax law there could be no taxable event until the cigarettes were sold to a non-Indian purchaser:

> Essentially the [district] court accepted the state's contention that the tax falls upon the first event which may constitutionally be subjected to it. In the case of sales made by non-Indians to non-Indians, this means the incidence of the tax is on the seller, or perhaps on someone even further up the chain of distribution, because that person is the one who first sells, uses, consumes, handles, possesses or distributes the products. Where the wholesaler or retailer is an Indian on whom the tax cannot be imposed under *McClanahan v. State Tax Commission*, 411 U.S. 164 (1973), the first taxable event is the use, consumption or possession by the non-Indian purchaser. Hence, as the district court concluded, the tax falls on that purchaser. We accept that conclusion.

Colville, 447 U.S. at 142, n.9.

The State argues that *Moe* and *Colville* authorize general "burdens on Indian traders", justifying the regulations at issue herein (Pet. Br. at 14). But those cases did not permit imposition of state burdens upon Indian traders acting within the scope of the Indian trader statutes. The retailers in *Colville* were tribes (who are not required to have Indian trader's licenses[9]) and Indians, who were licensed traders and who sold to Indians as well as non-Indians. However, insofar as they were selling to non-Indian retail purchasers, their status as licensed Indian traders was immaterial and purely incidental. The key to the *Colville* decision was that the retail sales to non-Indians were not regulated by the Indian trader statutes. *Colville*, 447 U.S. at 155-56. Similarly, the record keeping obligations imposed on the retailers, as part of the state's regulation of retail sales to non-Indians, only concerned preliminary determination of the retail customer's status.

Also, the off-reservation seizure of untaxed cigarettes enroute to the reservations which was approved in *Colville* does not constitute authority for states imposing "burdens on Indian traders." In *Colville*, the cigarettes which were seized had already been purchased off the reservation by the tribes.[10] The seizure of the tribes'

[9] Only "persons" must obtain an Indian trader's license. 25 U.S.C. §262 (A44).

[10] *See*, Pretrial Order entered in the District Court in *Colville* (R. at 158) which provided the stipulated facts and respective contentions of the parties where the State of Washington contended as follows:

(Footnote continued on following page.)

cigarettes off the reservation was approved as part of the regulation of the retail transactions because the tribes "refused to fulfill collection and remittance obligations [upon them] which the state has validly imposed." 447 U.S. at 161-62. Thus, a reservation sale within the scope of the Indian trader statutes and regulations was not at issue. Moreover, the Court stated "[i]t is significant that these seizures took place outside the reservation in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries." *Id.* at 162.

That *Moe* and *Colville* did not in any way limit or overrule this Court's holding in *Warren Trading Post* is evident by this Court's treatment of *Warren Trading Post* in cases decided after *Moe* and *Colville*. Just two weeks after deciding *Colville*, the Court issued its decisions in *Central Machinery* and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In *Central Machinery*, the Court confirmed its finding in *Warren Trading Post* that Congress had occupied the field of regulatory sales to Indians by Indian traders. 448 U.S. at 165. In *Bracker*, the Court held that the federal scheme regulating Indian owned timber was so comprehensive that "like in *Warren Trading Post* . . . [it] leaves no room for the additional burdens imposed by state law." *Id.* at 151 n.15.

(Footnote continued from preceding page.)

> 5.5 Washington may classify as "contraband" unstamped cigarettes *owned by the tribe* and intended for ultimate resale by tribally licensed retailers to non-members of the tribe in violation of state law, and may seize and sell such cigarettes in the manner prescribed by state law, whether such cigarettes are held on plaintiffs Indian reservations or are in transit in interstate commerce to plaintiffs' Indian reservations from points outside the state (emphasis supplied).

2. Potawatomi did not limit or overrule Warren Trading Post.

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the issue was whether tribal sovereign immunity could be compromised by permitting states to directly assess taxes and bring suit against a tribe because the tribe failed to collect and remit state cigarette excise taxes on reservation retail sales to non-members of the tribe. Federal pre-emption of trade with Indians was not at issue in that case. The Indian trader laws were not even mentioned in *Potawatomi*.

The Court held in *Potawatomi* that state taxes could not be assessed against an Indian tribe, declining Oklahoma's invitation to cast aside the long-standing doctrine of tribal sovereign immunity. The Court also held, however, that tribal sovereign immunity does not prevent a state from requiring an Indian tribe to collect taxes from non-members of the tribe on *retail* purchases, citing *Moe* and *Colville*. 498 U.S. at 512.

Rather than expand the application of *Moe* and *Colville* to allow state regulation of transactions subject to the Indian trader laws, the Court in *Potawatomi* simply reaffirmed its prior decisions in *Moe* and *Colville* concerning the regulation of *retail* sales to *non-Indians*:

> Those cases stand for the proposition that the doctrine of sovereign immunity does not prevent a State from requiring *Indian retailers* doing business on tribal reservations to *collect* a state-imposed cigarette tax on their *sales to non-members of the Tribe*.

Potawatomi, 498 U.S. at 513 (emphasis supplied).

In *dictum* relied on by the State in this case, the Court responded to Oklahoma's contention that the decision left it without a remedy to enforce its right to impose its tax on tribal sales to non-Indians under *Moe* and *Colville*. The Court stated:

> [W]e are not persuaded that [the State] lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. *See Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville, supra*, 447 U.S. at 161-162, 100 S.Ct., at 2085-2086, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (CA10 1990). States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. *See* 48 Stat. 987, as amended, 25 U.S.C. §476. And if Oklahoma and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress.

498 U.S. at 514.

The State reads the *dictum* regarding taxing wholesalers as applicable to every wholesale transaction with an Indian, on or off the reservation. The Atteas urge that it is more appropriate to view such comment in the context of the *Potawatomi* case and the facts and issues presented therein. The tax in *Potawatomi* was not imposed on the wholesale transaction. It was assessed against the tribe because of its failure to collect the tax from non-Indian customers at the retail level. An assessment against a wholesaler trading with Indians was not at issue. Wholesalers were not even parties to

the case, and hence their interests were not pertinent to the Court's decision. Federal pre-emption under the Indian trader statutes was not briefed or argued or referred to in the opinion. Most importantly, the key opinions in *Warren Trading Post* and *Central Machinery* were not mentioned.

The Court's *dictum* was made in the context of listing various alternatives available to the state in lieu of direct taxation of a tribe, by way of illustration rather than analysis. For example, the case cited in *Potawatomi* for taxing wholesalers, *City Vending of Muskogee, Inc. v. Oklahoma Tax Commission*, 898 F.2d 122 (10th Cir. 1990), was decided on procedural grounds. In that case, the Tenth Circuit Court of Appeals held that the bankruptcy court lacked jurisdiction to review an assessment of state cigarette tax against a wholesaler because the tax had become finally assessed and the wholesaler failed to seek timely judicial review of the assessment prior to the filing of a bankruptcy petition. 898 F.2d at 124-25. The Court in *City Vending* did not address the merits of the case or consider the doctrine of federal pre-emption. 898 F.2d at 125.

It is respectfully submitted that the more reasonable interpretation of the general *dictum* in *Potawatomi* is that states may tax wholesalers except where states lack the power to do so, by reason of the Constitution, the laws or treaties of the United States. A contrary interpretation would require a conclusion that the Court overruled *Warren Trading Post* and *Central Machinery* without even citing such cases. Moreover, if states had the power to tax sales by Indian traders to Indians on reservations as the State claims under *Potawatomi*, there would be no need to consider the other alternatives suggested by the Court, such as tax collection agreements with tribes, or relief from Congress.

C. The Policy Arguments Raised by the State and *Amici* for overruling or limiting Warren Trading Post and Central Machinery should be addressed to Congress.

This Court has never wavered from its determinations in *Warren Trading Post* and *Central Machinery* that Congress intended to pre-empt state authority to regulate or tax the sale of goods by Indian traders to Indians on reservations. Because the Court previously determined in those decisions that Congress intended to occupy the field of regulating sales to Indians on Indian reservations, the Court need not re-examine the various federal, state and tribal interests involved, as the State and various *amici* contend. The Court balanced those interests in *Warren Trading Post* and *Central Machinery* and found that Congress had occupied the field. It is not necessary for the Court to re-invent the wheel on a case by case basis each time a state attempts to tax or regulate transactions within a field already found to be pre-empted by federal law.

The Court made it perfectly clear in *Central Machinery* that a change in the pre-emptive effect of the Indian trader statutes would have to come from Congress by stating:

> It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them a "sweep as broad as [their] language" . . . .

448 U.S. at 166 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

Congress has not often seen it appropriate to permit states to regulate matters pertaining to Indians. The Court has often observed that there is a " 'deeply rooted'

policy in our Nation's history of 'leaving Indians free from state jurisdiction and control' ", *Oklahoma Tax Com. v. Sac and Fox Nation*, _____ U.S. _____, 113 S.Ct. 1985, 1991 (1993) (quoting *McClanahan*, 411 U.S. at 168). *See also United States v. Kagama*, 118 U.S. 375, 384 (1886) (noting that the Indians are in need of the federal government's protection from the states in which the reservations are located).

This is not to say that Congress never authorizes states to act in matters involving trade with Indians. In *Rice v. Rehner*, 463 U.S. 713 (1983), the Court held that Congress specifically and expressly authorized state regulatory burdens on liquor transactions on Indian reservations under 18 U.S.C. §1161. The Court noted that "[i]n *Warren Trading Post Co.*, we held that Congress did not authorize *any* additional burdens on the licensed trader while in this case we think that Congress did authorize the regulation." 463 U.S. at 734 n.18 (emphasis added). No similar authorization from Congress exists to permit state taxation and regulation of the Atteas' sales of cigarettes to Indians on Indian reservations.

Although Congress has had over 25 years to change the decision in *Warren Trading Post* if it disagreed with it, Congress has not chosen to do so. *See, Hilton v. South Carolina Public Railways Commn.*, _____ U.S. _____, 112 S.Ct. 560, 564 (1991); *see, also Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (the doctrine of *stare decisis* has "special force" where "Congress remains free to alter what we [the Supreme Court] have done"). Adherence to the principle of *stare decisis* is particularly important in a case such as this where parties engaged in commerce have set up and invested in trading relationships in reliance upon the Court's prior holdings that the Indian trader statutes leave no room

for any supplementary state burdens. *See, Payne v. Tennessee,* _____ U.S. _____, 111 S.Ct. 2597, 2610 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved").

The State essentially urges the Court to overrule *Warren Trading Post* and *Central Machinery* and contends that the collection of the tax at the wholesale level is necessary to prevent tax evasion by non-Indian retail customers, offering completely speculative and unsubstantiated estimated losses which the petitioners admit were not a part of the record below.[11]

Similar tax evasion arguments were rejected in North Dakota's recent unsuccessful attempt to convince the Court that a State may require out-of-state mail-order distributors to collect use taxes on purchases in interstate commerce by residents of the state. *Quill Corp. v. North Dakota,* _____ U.S. _____, 112 S.Ct. 1904 (1992). Just as Congress has power to regulate commerce among the states and, in some instances, may authorize state actions that burden interstate commerce (*Id.* at 1909), so too may Congress authorize state burdens on commerce with Indians. Until Congress chooses to authorize supplementary state taxation and regulation of sales to Indians, however, the law is clear—the state may not impose any burdens on wholesale sales to Indians on Indian reservations.

The goal to be achieved through the State's regulatory efforts, however meritorious or justified it may be, is immaterial. Where Congress has occupied the field, the

[11] In the trial court, the State estimated its revenues lost from non-collection of the tax on on-reservation sales of cigarettes to non-Indians at $10-15 million (R. 121). Before this Court, the state estimates such uncollected taxes at $65 million (Pet. Brief at 11).

State cannot impose any regulations, whatever their justification. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 203-04, 213-14 (1982). *See also New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983) (explaining that in addition to the broader pre-emption analysis conducted by the Court in Indian matters, "... a state will certainly be without jurisdiction if its authority is pre-empted under familiar principles of pre-emption ...").

In any event, as outlined by the Court in *Potawatomi,* the State has alternate remedies. Affirmance of the Court of Appeals' narrow holding in this case would not prevent New York from enacting proper legislation applicable to retail purchases by non-Indian retail customers. The cases relied on by Petitioners, *Moe, Colville* and *Potawatomi,* all sanctioned minimal state burdens at the retail level. Also, New York may negotiate tax agreements with Indian tribes, another possible avenue noted by this Court in *Potawatomi,* 498 U.S. at 514. In 1988, New York negotiated such an agreement with the Seneca Nation of Indians, but it was not ratified. Perhaps different terms may be explored.

Finally, if these alternatives are not satisfactory, New York may seek relief from Congress, as noted by this Court in *Potawatomi. Id. See also Central Machinery,* 448 U.S. at 166. Indeed, the various *amici* briefs filed by competing cigarette vendors highlight the inherently political nature of balancing the various *private* interests at stake. Whether the Indian trader laws should be changed because, as *amici* contend, it is unfair to non-Indian cigarette vendors, is not for this Court to decide. The proper forum for balancing competing private interests is Congress.

See, County of Yakima v. Yakima Indian Nation, _____ U.S. _____, 112 S.Ct. 683, 692 (1992), quoting *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 177 (1980) (concurring opinion of Rehnquist, *J.*) ("Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress.").

In the *Quill Corp.* case, the State of North Dakota was faced with the difficult problem of collecting use taxes from its residents on purchases from out-of-state mail order distributors. The Court declined to overrule its prior holding in *National Bella Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), which precluded North Dakota's effort to have the out-of-state distributors collect such taxes from North Dakota's residents and remit the same to the state. The Court stated as follows:

> [T]he underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.

112 S.Ct. at 1916 (citation omitted).

The Court in *Quill Corp.* further noted that overruling its prior decision might raise "thorny questions" concerning the retroactive application of such use taxes which "might trigger substantial unanticipated liability for mail-order houses" and that "[t]he precise allocation of such burdens is better resolved by Congress rather than this Court." *Id.* at 1916 n.10.

The State's desire in this case to have the applicable taxes collected at the wholesale level is purely one of convenience and "policy". The State is supported in this case by *amici* briefs of 15 States, various governmental organizations such as the National Governors' Association and numerous trade associations. Considering this Court's directives in *Central Machinery* that a change in the pre-emptive effect of the Indian trader statutes would have to come from Congress, the State does not say why, with that type of political support, it cannot seek redress from Congress.

POINT II

THE STATE REGULATIONS ENCROACH UPON THE POWERS RESERVED TO THE COMMISSIONER OF INDIAN AFFAIRS BY THE INDIAN TRADER STATUTES.

This Court should affirm the Court of Appeals' decision on the additional grounds that the state's tax scheme at issue is pre-empted because it "impinges on the authority of the Commissioner of Indian Affairs to determine 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians,' " and imposes "significant burdens" on wholesale sales to Indians. 81 N.Y.2d at 427 (A11-A12) (quoting 25 U.S.C. §261). *See also Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1940).

A. The State's Limitation on the Quantity of Unstamped Cigarettes Which Indian Traders May Sell is Pre-empted.

The State limits the quantity of unstamped cigarettes which may be sold by Indian traders by (1) calculating "the probable demand of qualified Indian consumers" on each reservation based on average consumption of cigarettes per capita in New York and either the number of enrolled tribal members or the reservation service area population, 20 NYCRR §335.7(d)(2)(ii) (A72); (2) calculating such demand for each "trade territory" (an area determined by the State) within each reservation, 20 NYCRR §335.7(d) (A72); (3) requiring prior approval of each wholesale sale to each wholesaler or retail dealer, 20 NYCRR §335.7(c)(2) (A72); (4) providing "Tax Exempt Coupons" to retailers which limit the amounts of untaxed cigarettes which they may buy for resale to non-Indians (JA 44a-45a); and (5) providing that if the

cigarette agent sells cigarettes in excess of the approved amount, he is liable for the tax on the excess amount. 20 NYCRR §335.7(e) (A74); (JA 45a). Because the State's regulations encroach upon the Commissioner's "sole power" to regulate quantity, 25 U.S.C. §261, they are pre-empted. *Hines*, 312 U.S. at 66-67.

In its brief, the State does not even address this issue. The State would have this Court believe that this case is about mere record-keeping burdens on the traders, and not about the other significant limitations imposed on sales by Indian traders to Indians, including especially the limitations as to quantity which are the very heart of the challenged regulations. The State claims that its regulations "require only that wholesalers keep a record of their taxable and tax exempt sales as an adjunct of the State's unquestioned right to require the collection and remition [sic] of taxes on sales to non-Indians." Pet. Br. at 23. But one of the so-called "records" which the trader must retain is the "Tax Exemption Coupon" which the trader must obtain from the retailer *as a condition of making the sale.* (JA 45a). The availability of the Tax Exemption Coupons is strictly limited by the State to the numbers which *it alone*[12] determines are needed to meet "the probable demand of qualified Indian consumers" for cigarettes on each reservation, in each

[12] A tribe may submit evidence of "probable demand" only if the tribe "regulates licenses or controls the sale and distribution of cigarettes within the reservation," and even then it is the State which makes the determination unilaterally. 20 NYCRR §335.7(d)(2)(i) (A73).

"trade territory," and from each dealer.[13] The Tax Exemption Coupons are thus no mere "records." They are rationing coupons allotted by the State, and any sales in excess of the amounts shown on the coupon are considered taxable by the State. 20 NYCRR §335.7(e) (A74; JA 45a).

B. The State's Requirement that the Tax be Included as Part of the Price is Pre-empted.

The State's regulations require the cigarette excise tax to be paid on all sales in excess of the pre-approved amounts. 20 NYCRR §335.7(c) (A72; JA 45a). The tax law provides that such tax "shall be advanced and paid by the agent," and shall then be "added to and collected *as part of the sale price* of the cigarettes." New York Tax Law §471[2], [3] (A46-A47) (emphasis added); *see* 81 N.Y.2d at 422 (A4). The State admits that "the tax is added and collected as part of the selling price," Pet. Br. at 10 (*see also* R 124), but offers no explanation of why this direct conflict with 25 U.S.C. §261 does not render the regulations void. Because the regulations encroach upon the Commissioner's sole power to regulate price, they are pre-empted.

Amici argue that Section 261 should be read narrowly "in light of its purpose of preventing fraud," and that the taxes are "fair and reasonable" and thus comply with the BIA price regulations. Nat'l Gov. Ass'n Brief at 20 (citing 25 C.F.R. §140.22 (RA22)). The purpose of section 261, however, was to grant the Commissioner full

[13] The Department claims in its brief that it calculates the "*maximum* legitimate Indian consumption" or the "*maximum* probable demand" for cigarettes by Indian consumers. Pet. Br. at 11, 24 (emphasis added). In fact the regulations nowhere use either term. Rather, they calculate the "probable demand" based on *average* per capita consumption by New Yorkers and estimates of the number of Indian consumers, as described above.

and sole authority to regulate trade with Indians, including specifically the price at which goods are sold to the Indians. This is clear from the language of the statute itself. The state regulations thus encroach upon the Commissioner's authority and are pre-empted; whether or not the taxes are fair and reasonable is irrelevant.

C. The Requirements that Indian Traders Obtain State Licenses and Sell Only to Dealers Registered by The State are Pre-empted.

The Indian trader statutes provide that the Commissioner has "[t]he sole power and authority to appoint traders to the Indian tribes," 25 U.S.C. §261; and that no non-Indian shall introduce goods or trade on a reservation "without such license." 25 U.S.C. §264 (A45). The Commissioner has promulgated extensive regulations recognizing and implementing his "sole power and authority to appoint [Indian] traders." 25 C.F.R. §140.1 (RA12); *see also* 25 C.F.R. §§140.9, .11 - .26 (RA19-RA23).

The State's regulations limit and prescribe conditions as to who may sell cigarettes to Indians on the reservation. Under the State's scheme, "only . . . licensed cigarette agents may sell tax-free products either to an Indian nation or to a registered dealer . . ." (JA 44a). Cigarette agents must also obtain a wholesaler's license to sell at wholesale. 20 NYCRR §331.1(e)(2) (RA7). The regulations would therefore require Elias Attea and other Indian traders to obtain state licenses in order to conduct the very business authorized by their federal licenses. The regulations therefore encroach upon the Commissioner's sole power to "appoint" persons to trade with the Indians, 25 U.S.C. §261; *see also*, 25 U.S.C.

§§262, 264; 25 C.F.R. §140.1 (RA12), and they are therefore pre-empted. *See Moe*, 425 U.S. at 475-81 (state's vendor license fee pre-empted as to Indian retailers), *aff'g, Confederated Salish and Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1307, 1317 (D.Mont. 1975) (state could not require Indian retailer to possess cigarette dealer's license). *See also Rice*, 463 U.S. at 735 (Blackmun, *J.*, dissenting) ("A State, through its own licensing requirements, cannot choose who may trade with the Indians and what goods they may sell.").[14]

Similarly, the State cannot, consistent with the Indian trader laws, limit to whom the Indian traders may sell. Where, as here, the traders' licenses authorize them to sell to Indians on particular reservations without limitation as to whom they may sell (*see, e.g.*, R 339-43), the state cannot impose such limitations. Thus, the State's rules limiting sales by traders to pre-approved sales to Indian retailers who are "registered dealers," and to tribes that have "exempt organization certificates," 20 NYCRR §335.6(b)(4), (d)(1) (A63, A65), are pre-empted.

[14] In *Rice*, the Court upheld the requirement that a federally-licensed Indian trader obtain a state liquor license because Congress had delegated authority to the states to regulate the sale of liquor to Indians. 463 U.S. at 715, 734 n.18.

POINT III

BY IMPOSING ITS TAX ON THE WHOLESALE SALE BY INDIAN TRADERS TO INDIANS, THE STATE ILLEGALLY TAXES INDIANS.

The Court of Appeals further concluded that "[t]he tax scheme requires wholesale distributors to prepay taxes on all cigarettes delivered on the reservation in excess of the predetermined maximum amount and, with respect to those cigarettes, *imposes a sales tax on Indian retailers.*" 81 N.Y.2d at 427 (A11) (emphasis supplied).

The Court has traditionally accorded great deference to interpretations of state tax provisions by the highest court of a state. *See, e.g., United Air Lines v. Mahin, Director of Department of Revenue*, 410 U.S. 623, 629 (1973) ("this Court usually has deferred to the interpretation placed on a state tax statute by the highest court of the State").

The imposition of a tax on the Indian retailer clearly violates the long-standing principle that Indians are immune from paying state taxes for activity conducted in Indian country since states may tax Indians only when Congress has manifested clearly its consent to such taxation. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985); *see also, McClanahan*, 411 U.S. at 170-71.

The imposition of a tax upon the wholesale sale to an Indian on a reservation under the New York Tax Law is significantly different from the imposition of the tax under the Washington tax statute in *Colville*. The Washington statute imposed a cigarette tax "at the time and place of the first taxable event occurring within this State." R.C.W. 82.24.080. The Court explained in *Colville* that "where the wholesaler or retailer is an Indian on

whom the tax cannot be imposed under *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), the first taxable event is the use, consumption or possession by the non-Indian purchaser." 447 U.S. at 142 n.9. The Washington cigarette tax statute at issue in *Colville* was upheld because it limited imposition of the tax to the first taxable event. *Id.* at 140, n.2; *see also* the district court opinion in *Colville*, 446 F.Supp. 1339, 1355 n.15 (E.D. Wash. 1978).

While New York intends that the "ultimate incidence of and liability for the tax" is upon the consumer, New York Tax Law §471(2), by requiring wholesalers to pay, and collect from Indians, the tax at the wholesale level, the New York tax scheme imposes a liability *prior to* the first constitutionally permissible taxable event.

Because the Court of Appeals concluded that New York's cigarette tax scheme impermissibly imposes a tax upon the Indian retailer (A11-A12), the tax scheme is invalid.

CONCLUSION

The order of the Court of Appeals should be affirmed.

Dated: January 14, 1994.

Respectfully submitted,

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RESPONDENTS' APPENDIX

NEW YORK TAX LAW

§ 472. Preparation and sale of stamps; commissions; distributors

1. The tax commission shall prescribe, prepare and furnish stamps of such denominations and quantities as may be necessary for the payment of the tax on cigarettes imposed by this article, and may from time to time and as often as it deems advisable provide for the issuance and exclusive use of stamps of a new design and forbid the use of stamps of any other design, in the manner and with the effect provided in section two hundred seventy-four of this chapter. The tax commission shall make provisions for the sale of such stamps at such places and at such times as it may deem necessary and may license agents for such purpose. The tax commission may license dealers in cigarettes, who maintain separate warehousing facilities for the purpose of receiving and distributing cigarettes and conducting their business, who have received commitments from at least two cigarette manufacturers whose aggregate market share is at least forty percent of the New York state cigarette market, and importers, exporters and manufacturers of cigarettes, and other persons within or without the state as agents to buy or affix stamps to be used in paying the tax herein imposed, but an agent shall at all times have the right to appoint the person in his employ who is to affix the stamps to any cigarettes under the agent's control. The fee for filing such application for an agent's license shall be one thousand five hundred dollars, unless such fee has been paid during the preceding twelve months, in which case, the fee for a new license shall be one thousand dollars. All of the provisions of section four hundred eighty relating to wholesale dealers' licenses, including the procedure for

suspension, revocation, refusal to license, and for hearings, shall be applicable to agents' licenses applied for or granted pursuant to this section, as if such provisions had been set forth in full in this subdivision and had expressly referred to the applicant for, or the holder of, an agents's[1] license. Whenever the tax commission shall sell and deliver to any such agent any such stamps, such agent shall be entitled to receive as compensation for his services and expenses as such agent in selling or affixing such stamps, and to retain out of the moneys to be paid by him for such stamps, a commission on the par value thereof. The tax commission is hereby authorized to prescribe a schedule of commissions, not exceeding five per centum, allowable to such agent for buying and affixing such stamps. Such schedule shall be uniform with respect to the different types of stamps used, and may be on a graduated scale with respect to the number of stamps purchased. The tax commission may, in its discretion, permit an agent to pay for such stamps within thirty days after the date of purchase and may require any such agent to file with the department of taxation and finance a bond issued by a surety company approved by the superintendent of insurance as to solvency and responsibility and authorized to transact business in the state or other security acceptable to the tax commission, in such amount as the tax commission may fix, to secure the payment of any sums due from such agent pursuant to this article. If securities are deposited as security under this subdivision, such securities shall be kept in the custody of the commissioner of taxation and finance and may be sold by the tax commission if it becomes necessary so to do in order to recover any sums due from

[1] So in original.

such agent pursuant to this article, but no such sale shall be had until after such agent shall have had opportunity to litigate the validity of any tax if it elects so to do. Upon any such sale, the surplus, if any, above the sums due under this article shall be returned to such agent.

* * *

(As amended, L.1987, c. 860, § 1; L.1989, c. 61, § 77.)

Historical and Statutory Notes

* * *

1987 Amendment. Subd. 1., L.1987, c. 860, § 1, eff. Jan. 22, 1988, provided for the licensing of agents rather than appointment, provided for the licensing of certain dealers, provided for an application fee, and provided that the provisions of section 480 relating to wholesale dealers' licenses shall be applicable to agents' licenses.

Effective Date of Amendment by L.1989, c. 61; Applicability. Amendment by L. 1989, c. 61, § 77, eff. Apr. 19, 1989, and to apply on and after July 1, 1989, pursuant to section 365(d) of L.1989, c. 61, set out as a note under section 210.

Effective Date of Amendment by L.1987, c. 860; Certification and List of Registered Persons; Relicensing and Reregistering. Amendment by section 1 of L.1987, c. 860, effective Jan. 22, 1988, with the commissioner to certify persons registered as chain stores, etc., furnish a list of such persons, and to relicense and reregister agents, wholesale dealers and chain stores as provided in section 15 of L.1987, c. 860, as amended, set out as a note under section 489.

Severability of Provisions of L.1989, c. 61. See section 364 of L.1989, c. 61, set out as a note under section 424.

Separability of Provisions of L.1987, c. 860. See section 14 of L.1987, c. 860, set out as a note under section 483.

Cigarette Marketing Standards Advisory Council. See section 13 of L.1987, c. 860, set out as a note under section 480.

20 NYCRR PART 331

AGENT'S LICENSE

* * *

Historical Note

Part (§§ 331.1-331.10) repealed, new (§§ 331.1-331.8) filed Oct. 17, 1989 eff. Nov. 7, 1989.

Section 331.1 Licensing of agents. [Tax Law, §§ 471, 472(1), 473, 475, 480(1), (4) and 481(2)] (a) *Licensing of agents.*

* * *

(2)(i) The department may license as a cigarette agent, a dealer in cigarettes, either at the wholesale or retail level, to purchase cigarette tax stamps and to affix such stamps on packages of cigarettes to be sold by the dealer in New York State. Such dealer must maintain a separate warehousing facility for the purpose of receiving and distributing cigarettes and conducting its business, and must receive commitments from at least two cigarette manufacturers whose aggregate market share of the New York State cigarette market is at least 40 percent.

(a) A separate warehousing facility for the purpose of receiving and distributing cigarettes and conducting business shall mean a warehouse, storehouse or other commercial building, or a group of such buildings, wherein cigarettes are received, stored and distributed and the dealer's day-to-day business activities are conducted. Such a warehousing facility must be separate and distinct from any other person's facilities. A warehousing facility shall not include a mere enclosure within a larger facility, nor a means of transportation (*i.e.*, a truck or van).

(b) In addition to maintaining such a separate warehousing facility, an applicant dealer must receive and forward to the department as proof thereof, written commitments from two or more cigarette manufacturers, who collectively share at least 40 percent of the New York State cigarette market, to the effect that such manufacturers agree or pledge to sell cigarettes directly to the dealer.

* * *

(c)(1) The Department of Taxation and Finance, in order to protect the State's cigarette tax revenue and to insure compliance with the cigarette marketing standards contained in article 20-A of the Tax Law, may periodically review the status of a licensed agent and may, at any time, require any such person to submit to the department:

(i) any records maintained in the normal course of business, including but not limited to, any records required to be maintained by the department; and

(ii) current financial statements certified by a licensed public accountant or a certified public accountant pursuant to an audit conducted by such accountant.

(2) Not more often than once every three years, the department (in order to properly administer the cigarette tax imposed by article 20 of the Tax Law or the Cigarette Marketing Standards Act contained in article 20-A of such law) may require every licensed cigarette agent to file a new application for a license, again comply with, or prove its compliance with, all of the requirements of the Tax Law and this Title in relation to cigarette agent's licenses and to surrender its existing license (see section 331.8 of this Part).

* * *

(e)(1) A license as an agent granted pursuant to article 20 of the Tax Law and this Part does not necessarily qualify a person as an agent for purposes of the cigarette marketing standards contained in article 20-A of the Tax Law (see article 2 of this Subchapter).

(2) Where an applicant for a license as a cigarette agent or where an agent is also a wholesale dealer of cigarettes, such applicant or agent must also obtain a license as a wholesale dealer pursuant to Part 332 of this Title. Both the application for a license as a cigarette agent and the application for a license as a wholesale dealer of cigarettes are subject to individual application filing fees.

* * *

Section 331.2 Agent's Bond Requirements. [Tax Law, 472(1)].

* * *

(b) *Performance bonds.* At the time of application for a license as a cigarette agent, an applicant must submit to the Department of Taxation and Finance a performance bond with the people of the State of New York as beneficiary (or arrange for the deposit with the department of other acceptable security) in the penal sum of $1,000. Such bond is to insure that

the licensee will properly perform the duties and responsibilities of a cigarette agent as required by article 20 of the Tax Law and the rules and regulations promulgated thereunder and that such licensee will not suffer or permit any violations of such provisions of the Tax Law or rules or regulations to give cause for the cancellation or suspension of such agent's license.

* * *

331.3 **Deposit of other security.** [Tax Law, § 472(1)] (a) In lieu of the bonds described in section 331.2 of this Part, an applicant or an agent may deposit with the Department of Taxation and Finance other security, approved by the department, in such amounts as it may require. Among the kinds of security which may be acceptable are the following:

(1) certificated United States Treasury bonds;

(2) certificated bonds of New York State;

(3) certificated bonds of any political subdivision of New York State having general governmental powers, and in connection with which, the credit of the political subdivision is pledged for the payment of the interest and principal due on such bonds;

(4) financial institution passbooks and certificates of deposit;

(5) irrevocable standby letters of credit made payable to the New York State Department of Taxation and Finance; and

(6) any other forms of security acceptable to the Department of Taxation and Finance.

* * *

PART 332

CIGARETTE WHOLESALE DEALER'S LICENSE

* * *

Section 332.1 Licensing of wholesale dealers of cigarettes. [Tax Law, §§ 475 and 480]

* * *

(b)(1) An application for a license as a wholesale dealer of cigarettes must be made on a form prescribed by the Department of Taxation and Finance for such purpose and must fully disclose all of the information requested therein. Such application must be accompanied by a nonrefundable $1,500 fee for filing the application in the form of a bank check, certified check (or other guaranteed draft acceptable to the department) or money order, made payable to the Department of Taxation and Finance, unless such fee has been paid during the preceding 12 months, in which case, the fee for a new license shall be $1,000. There will be no fee, however, for the filing of an application for a license as a wholesale dealer where such application is based solely upon the ownership, operation or maintenance of one or more cigarette vending machines in, at or upon premises owned or occupied by another person.

* * *

(4) Not more often than once every three years, the department (in order to properly administer the cigarette tax imposed by article 20 of the Tax Law or the Cigarette Marketing Standards Act contained in article 20-A of such law) may require every licensed wholesale dealer to file a new application for a license, again comply with, or prove its compliance with, all of the requirements of the Tax Law and this Title in relation to wholesale dealers and to surrender its existing license. The provisions of

section 331.8 of this Title apply to the provisions of this paragraph in the same manner and with the same force and affect as if the language had been incorporated in full into this paragraph and had expressly referred to the wholesale dealer's license under this Part. The department may, in its discretion, relicense wholesale dealers and cigarette agents concurrently.

* * *

[338]* 25 CODE OF FEDERAL REGULATIONS
PART 140

PART 140—LICENSED INDIAN TRADERS

Sec.

140.1 Sole power to appoint.
140.2 Presidential prohibition.
140.3 Forfeiture of goods.
140.5 Bureau of Indian Affairs employees not to contract or trade with Indians except in certain cases.
140.9 Application for license.
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140.16 Trade in annuities or gratuities prohibited.
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140.22 Inspection of traders' prices.
140.23 Credit at trader's risk.
140.24 Cash payments only to Indians.
140.25 Trade in antiquities prohibited.
140.26 Infectious plants.

AUTHORITY: Sec. 5, 19 Stat. 200, sec. 1, 31 Stat. 1066 as amended; 25 U.S.C. 261, 262; 94 Stat. 544, 18 U.S.C. 437; 25 U.S.C. 2 and 9, and 5 U.S.C. 301, unless otherwise noted.

SOURCE: 22 FR 10670, Dec. 24, 1957, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1962.

* Page references are to Volume 25, Code of Federal Regulations.

CROSS REFERENCES: For law and order regulations on Indian Reservations, see part 11 of this chapter. For regulations pertaining to business practices on Navajo, Hopi and Zuni reservations, see part 141 of this chapter. For additional regulation of certain employees trading with Indians, see 43 CFR part 20.735-28 and 29.

§ 140.1 Sole power to appoint.

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 140.2 Presidential prohibition.

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or of any particular articles, into the country belonging to any Indian tribe, and to direct that all licenses to trade with such tribe be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe.

(R.S. 2132; 26 U.S.C. 263).

§140.3 Forfeiture of goods.

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without a license, shall forfeit all

merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500; *Provided*, That this section shall not apply to any person residing among or trading with the Choetaws, Cherokee, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes: *And provided further,* That no white person shall be employed as a clerk by any Indian trader, except as such trade with said Five Civilized Tribes, unless first authorized so to do by the Commissioner of Indian Affairs.

(R.S. 2133, as amended; 25 U.S.C. 264).

§140.5 Bureau of Indian Affairs employees not to contract or trade with Indians except in certain cases.

(a) Definitions of terms as used in this part:

[339] (1) "Indian" means any member of an Indian tribe recognized as eligible for the services provided by the Bureau of Indian Affairs who is residing on a Federal Indian Reservation, on land held in trust by the United States for Indians, or on land subject to a restriction against alienation imposed by the United States. The term shall also include any such tribe and any Indian owned or controlled organization located on such a reservation or land.

(2) "Bureau" or the "Bureau of Indian Affairs" means the Bureau of Indian Affairs and the Office of the Assistant Secretary for Indian Affairs, both in the Department of the Interior.

(3) "Employee" means an officer, employee, or agent of the Bureau of Indian Affairs.

(4) "Secretary" means the Secretary of the Interior.

(5) "Contract" means any agreement made or under negotiation with any Indian for the purchase, transportation or delivery of goods or supplies.

(6) "Trading" means buying, selling, bartering, renting, leasing, permitting and any other transaction involving the acquisition of property or services.

(7) "Commercial trading" means any trading transaction where an employee engages in the business of buying or selling services or items which he/she is trading.

(b) With the exceptions provided in subsection (b) of section 437 of title 18 U.S. Code, section 437 provides that whoever, being an officer, employee, or agent of the Bureau of Indian Affairs, has (other than as a lawful representative of the United States) any interest, in such officer, employee, or agent's name, or in the name of another person where such officer, employee, or agent benefits or appears to benefit from such interest;

(1) In any contract made or under negotiation with any Indian, for the purchase, transportation or delivery of goods or supplies for any Indian, or

(2) In any purchase or sale of any service or real or personal property (or any interest therein) from or to any Indian, or colludes with any person attempting to obtain any such contract, purchase, or sale, shall be fined not more than $5,000 or imprisoned no more than six months or both, and shall be removed from office, notwithstanding any other provision of law concerning termination from Federal employment.

(c) The further subsections of this section authorize certain employees contracting and trading with Indians as authorized by the exceptions in section 437 of title 18 U.S. Code. All such contracting and trading is subject to

the express provision of section 437 that none of the sales or purchases so authorized may be made if the purpose of any such sale, trade, or purchase is that of commercially selling, reselling, trading, or bartering such property.

(d)(1) Under authority granted by section 437(b)(1) of title 18 U.S. Code employees of the Bureau of Indian Affairs may, with the approval of an authorized officer of the Bureau, as designated in paragraph (d)(2) of this section, purchase from or sell to an Indian any service or any real or personal property, not held in trust by the United States or subject to a restriction against alienation imposed by the United States, or any interest in such property. In addition, employees may purchase from Indians without approval from an authorized officer of the Bureau any non-trust or unrestricted personal property for home use or consumption the value of which property does not exceed $1000. Where the purchase or sale price is less than $1,000, employees may also purchase motor vehicles for their personal use from Indians or sell their personal motor vehicles to Indians without obtaining approval of such purchases or sales from an authorized officer of the Bureau. Approval must be obtained if the purchase or sale price is $1,000 or more.

(2) As used in paragraph (d)(1) of this section an authorized officer of the Bureau of Indian Affairs for employees on reservations and in agencies or in field service units shall be the superintendent or other officer in charge of the unit in which the employee is employed. The authorized officer for the superintendent or officer in charge is his or her immediate supervisor. The authorized officer for [340] employees in area offices is the Area Director, and the authorized officer for an Area Director

is his or her immediate supervisor. The authorized officer for employees in the Central Office is the Deputy Assistant Secretary—Indian Affairs (Operations).

(e) No employee of the Bureau of Indian Affairs may have any interest in any purchase or sale involving property or funds which are either held in trust by the United States for Indians or which are purchased, sold, utilized, or received in connection with a contract or grant to an Indian from the Bureau if such employee is employed in the office or installation of the Bureau which recommends, approves, executes, or administers such transaction, grant, or contract on behalf of the United States, except that, as authorized by section 437(b)(1) of title 18 U.S. Code an employee of the Bureau may have such an interest if such purchase or sale is approved by an authorized officer of the Bureau, as designated in paragraphs (e)(3) to (5) of this section, and the conditions in (e)(1) and (2) of this section are satisfied to the extent to which they are applicable to the transaction concerned;

(1) The conveyance or granting of any interest in property held in trust or subject to restriction against alienation imposed by the United States is otherwise authorized by law.

(2) Trading by employees with Indians which involves property or funds which are either held in trust by the United States or are subject to restrictions against alienation imposed by the United States must be conducted on the basis of sealed bid or public auction. If the trading involves leases or sales of trust or restricted Indian land it must be conducted on the basis of sealed bids. Such requirements for sealed bid or public auction may only be waived by the Assistant Secretary for Indian Affairs on the basis of a full report showing:

(i) The need for the transaction,

(ii) The benefits accruing to both parties,

(iii) That the consideration for the proposed transaction shall be not less than the fair market value of the trust or restricted property or interest therein, unless the employee is involved in a transaction in accordance with § 152.25 (c) or (d) or § 162.5(b)(1), (2), or (3) of this title or the employee is the recipient of a benefit for tribal members for which a uniform charge to all members is made, and

(iv) An affidavit as follows shall accompany each proposed transaction: "I (name) (title), swear (or affirm) that I have not exercised any undue influence nor used any special knowledge received by reason of my employment in the Bureau in obtaining the (grantor's, purchaser's, vendor's) consent to the instant transaction."

(3) The authorized officer of the Bureau for employees employed on reservations, in agencies or service units is one who is not a relative by blood or marriage of the employee, and is not employed at the employee's reservation, agency or service unit. That officer must also be employed at not less than one grade level higher than such employee at the Washington, District of Columbia, Central Office or at an Area Office other than that with authority over the employee's reservation, agency, or service unit.

(4) The authorized officer of the Bureau for employees employed in Area offices is one who is not a relative by blood or marriage of the employee, is not employed at the employee's area office, and must be employed at not less than one grade level higher than the employee at the Washington, District of Columbia, Central Office.

(5) The authorized officer of the Bureau for employees employed at the Washington, District of Columbia, Central Office is the Secretary.

(f) Except as provided in subsection (b)(2) of section 437 of title 18 U.S. Code as implemented by this section, nothing in the cited law shall be construed as preventing any employee of the Bureau who is an Indian, of whatever degree of Indian blood, from obtaining or receiving any benefit or benefits made available to Indians generally or to any member of his or her particular tribe, under any Act of Congress, nor to prevent any such employee who is an Indian from being a member of or receiving benefits by reason of his or her membership in any Indian tribe, corporation, or coop-
[341] erative association organized by Indians, when authorized under such rules and regulations as the Secretary or his/her designee has prescribed or shall prescribe.

[49 FR 26434, June 21, 1984]

§140.9 Application for license.

(a) Application for license must be made in writing on Form 5-052, setting forth the full name and residence of the applicant; if a firm, the firm name and the name of each member thereof; the place where it is proposed to carry on the trade; the capital to be invested; the names of the clerks to be employed; and the business experience of the applicant. The application must be forwarded through the Superintendent to the Commissioner of Indian Affairs, accompanied by two satisfactory testimonials on Form 2-077 as to the character of the applicant and his employees and their fitness to be in the Indian country, and by an affidavit of the Superintendent on Form 5-053 that neither he nor any

person for him has any interest, direct or indirect, present or prospective, in the proposed business or the profits arising therefrom, and that no arrangement for any benefit to himself or to any other person on his behalf is contemplated in case the license is granted. Licensed traders will be held responsible for the conduct of their employees.

(b) Itinerant peddlers or purveyors of foodstuffs and other merchandise shall be considered as traders and shall obtain a license or permit from the Superintendent setting forth the class of trade or peddling to be carried on, furnishing such character or credit references, or both, as may be required by the Superintendent. The period of the license for such itinerant peddlers shall be determined by the Superintendent.

(c) When a license or permit to trade is issued under the regulations in this part 140, a fee of $5, payable when the license is issued, shall be levied against the licensee.

[30 FR 8267, June 29, 1965. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 140.11 License period.

Licenses to trade shall not be issued unless the proposed licensee has a right to the use of the land on which the business is to be conducted. The license period shall correspond to the period of the lease or permit held by the licensee on restricted Indian land, except that where the proposed licensee is the owner or beneficial owner or holds a use right to the land on which the business is to be conducted, the license period shall be

fixed by the Commissioner of Indian Affairs or his authorized representative, but in no case shall the license period exceed 25 years.

[30 FR 8268, June 29, 1965. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 140.12 License renewal.

Application for renewal of license must be made to the Commissioner of Indian Affairs on Form 5-064, through the superintendent, at least 30 days prior to the expiration of the existing license, and the superintendent must report as to the record the applicant has made as a trader and his fitness to continue as such under a new license.

§ 140.13 Power to close unlicensed stores.

If persons carry on trade within a reservation with the Indians without a license, or continue to trade after expiration of the license without applying for renewal, the superintendent will immediately report the facts in the case to the Commissioner of Indian Affairs, who may, if necessary, direct the superintendent to close the stores of such traders.

§ 140.14 Trade limited to specified premises.

No trade with Indians is permitted at any other place than that specified in the license. Licenses do not cover branch stores. A separate license and bond must be furnished for each such store. The business of a licensed trader must be managed by the bonded principal, who must habitually reside upon the reservation, and not by an unbonded subordinate.

[342] § 140.15 License applicable for trading only by original licensee.

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the Commissioner of Indian Affairs. A license to trade with Indians does not confer upon the trader any right or privileges in respect to the herding or raising of livestock upon the reservation. The use of reservation lands, whether tribal or allotted, for such purposes can be obtained by a trader only upon the terms and under the restrictions which apply to other persons. His license gives him no advantage over others in this respect.

§ 140.16 Trade in annuities or gratuities prohibited.

Traders are forbidden to buy, trade for, or have in their possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians may not be purchased by any trader, not a member of the tribe to which the owners or possessors of the cattle belong, except with the written consent of the agent of said tribe.

§ 140.17 Tobacco sales to minors.

No trader shall sell tobacco, cigars, or cigarettes to any Indian under 18 years of age.

§140.18 Intoxicating liquors.

No trader shall use or permit to be used his premises for any unlawful conduct or purpose whatsoever. No trader shall use or permit to be used any part of his premises for the manufacture, sale, gift, transportation,

drinking or storage of intoxicating liquors or beverages in violation of existing laws relating thereto. Violation of this section will subject the trader to criminal prosecution, revocation of license and such other action as may be necessary.

§140.19 Drugs.

Traders shall not keep for sale, or sell, give away, or use any opium, chloral, cocaine, peyote or mescal bean, hashish or Indian hemp or marihuana, or any compound containing either ingredient, and for violation hereof the trader's license shall be revoked.

§140.21 Gambling.

Gambling, by dice, cards, or in any way whatever, is strictly prohibited in any licensed trader's store or on the premises.

§140.22 Inspection of traders' prices.

It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superintendent or inspecting officials the origial invoice, showing cost, together with a statement of transportation charges, retail price of articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.

§140.23 Credit at trader's risk.

Credit given Indians will be at the trader's own risk, as no assistance will be given by Government officials in

the collection of debts against Indians. Traders shall not accept pawns or pledges of personal property by Indians to obtain credit or loans.

§140.24 Cash payments only to Indians.

Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Payment must be made in money, or in credit if the Indian is indebted to the trader.

§140.25 Trade in antiquities prohibited.

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

[343] CROSS REFERENCES: For additional regulations pertaining to preservation of antiquities, see part 261 of this chapter. For regulations of the Bureau of Land Management regarding antiquities, see 43 CFR part 3.

§140.26 Infectious plants.

Traders shall not introduce into, sell, or spread within Indian reservation any plant, plant product, seed, or any type of vegetation, which is infested, or infected or which might act as a carrier of any pests of infectious, transmissible, or contagious diseases, as determined by the laws and regulations of the State for plant quarantine and pest control. For the purpose of enforcement of this provision State officers may enter Indian reservations, with the consent of the superintendent, to inspect the premises of such traders and otherwise to execute such State laws and regulations.

* * *